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No. 84-585.

In the
Supreme Court of the United States.

OCTOBER TERM, 1984.

JOSEPH LOMBARDO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petitioner's Reply Brief.

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Argument.

I. THE GOVERNMENT FAILS TO MEET PETITIONER'S ARGUMENT THAT THE COURT OF APPEALS APPLIED AN INCORRECT AND CONSTITUTIONALLY IMPERMISSIBLE STANDARD TO PETITIONER'S SUFFICIENCY OF THE EVIDENCE CLAIM.

The government attempts to dismiss petitioner's first argument as no more than a fact-centered claim of insufficiency of the evidence.

The government's argument patently misconstrues both petitioner's argument and the court of appeals' opinion. The government asserts that the "presence plus suspicious circumstances" standard, articulated and applied by the court of appeals, was actually just a "remark" which the court tossed out, after which it "simply reviewed the sufficiency of the evi-

dence and correctly concluded that it was 'ample' to support Petitioner's conviction" (Br. Opp. 3). This claim, that the court "simply reviewed the sufficiency of the evidence" without reference to any standard, suggests that the court somehow performed its review without employing *any* legal standard. This is obvious nonsense. The court's detailed review of the evidence, which immediately follows its articulation of the standard, clearly measures the evidence against that standard (see A. 35a-37a). That standard — which the government never really tries to defend — was incorrect.

The court's analysis dispenses with the necessity of requiring proof beyond a reasonable doubt that Petitioner *knew* that the alleged conspirators intended to influence the Senator's official acts by assisting him to purchase Wonderworld. It was only by applying that *incorrect* standard that the court could have concluded, as it did, that the evidence against Petitioner was "ample."[1] Petitioner's claim is much more than a quibble about whether or not a particular piece of evidence was sufficiently incriminatory; it is a claim that the court applied a devastatingly incomplete standard, one rejected by five other circuits.

Having thus mischaracterized Petitioner's argument, the government proceeds *as if* sufficiency of the evidence were actually the issue, detailing its version of the evidence and arguing that it was indeed sufficient (Br. Opp. 6-9). The government's lengthy characterizations of Lombardo's telephone calls are irrelevant to the questions before this Court. The court of appeals concluded that "from the secretive nature of the

[1] The government's reliance on the court's finding that the evidence was "ample" (see, e.g., Br. Opp. 3, 4, 10) is clearly misplaced. The "ample" evidence to which the court referred (A. 36a) was clearly the evidence of knowledge that something of value was given to the Senator, *not* evidence that Lombardo knew that a legislative quid pro quo was expected in return. It was only by applying the incorrect standard that the court could conclude that the evidence was "ample"; there is no indication whatsoever that a similar finding would have resulted had the correct standard been applied.

operation (Lombardo told Webbe over the phone, 'Just don't mention names') the jury could infer that Lombardo knew the favor was intended 'to influence an[ ] official act.'" (A. 37a). This was the only evidence adverted to by the court regarding Petitioner's knowledge of the quid pro quo. Thus, the court's finding of sufficiency was premised *solely* on Lombardo's stated wish to remain anonymous. It is not open to the government in reply to a petition for certiorari to inject descriptions of *other* evidence in an attempt to procure new findings of fact more to its taste. The court of appeals reviewed the evidence and described that evidence on which its opinion was based. Had the proper standard been applied, that evidence would have been palpably insufficient.

The government makes much of the fact that the court of appeals' opinion does not explicitly use the term "slight evidence." (Br. Opp. 4). But in adopting the "presence plus suspicious circumstances" standard, the *Lombardo* court relied on and quoted *United States* v. *Dalzotto*, 603 F.2d 642 (7th Cir. 1979). The *Dalzotto* court held that "once the conspiracy is established, even *slight evidence* may suffice to link a particular defendant to the conspiracy." *Dalzotto*, 603 F.2d at 645 (emphasis added). That holding was essential to both the *Dalzotto* and *Lombardo* courts' conclusions that presence plus suspicious circumstances would be sufficient evidence of a particular defendant's knowledge. *See* A. 36a; *Dalzotto*, 603 F.2d at 645.

The government's attempt to trivialize Petitioner's arguments also ignores the major implications this case has for other cases. First, this case presents the Court with an excellent opportunity to resolve a conflict among the circuits with respect to the constitutionality of an important legal rule.[2] Second, and

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[2] In a footnote, the government attempts, unsuccessfully, to minimize or deny the existence of the conflict among the circuits. First, the government claims

at least as importantly, the court of appeals' opinion in this case creates the frightening possibility that political bribery convictions will be obtainable in the future regardless of whether the government has persuasive proof that the defendant knew that his assistance to a public official (whatever form that assistance might take) was being used by others as part of a scheme to influence official acts. The court of appeals' opinion, as it now stands, makes all political contributors, PACS, or friends of public officials vulnerable to political prosecution and conviction if they associate with persons who bribe public officials, despite the contributor's complete ignorance of the conspiracy to bribe.

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that *United States* v. *Cooper*, 567 F.2d 252 (3d Cir. 1977), a case which squarely rejects the "slight evidence" rule, is inapposite because it deals with jury instructions, which are not at issue in this case. This argument creates a distinction without a difference. A jury instruction which permits a conviction on less than proof beyond a reasonable doubt is fatally flawed for exactly the same reason and on the same grounds as an appeals court opinion which upholds a conviction where the evidence (with all inferences drawn in favor of the prosecution) does not provide proof beyond a reasonable doubt on each element of the crime. So long as circuit courts of appeals continue to use the "slight evidence" test, *both* courts and juries will apply it.

The government's claim that the conflict between the circuits "is more apparent than real" (Br. Opp. 5 n.3) is equally unpersuasive. The fact that the *Cooper* court found it expedient to reconcile Third Circuit precedent so as to produce a consistent circuit rule says nothing at all about the obvious and persisting conflict between the Third Circuit and other circuits on the same issue.

Finally, the government claims that the "presence plus suspicious circumstances" standard is as innocuous as that enunciated in *Glasser* v. *United States*, 315 U.S. 60 (1942) (Br. Opp. 6 n.3). It is not. So long as the slight evidence rule persists, jurors may be instructed that they can convict a defendant on the basis of slight evidence. *See United States* v. *Walden*, 578 F.2d 966, 971 (3d Cir. 1978), *cert. denied*, 440 U.S. 936 (1979) (jury instruction of this type in trial conducted before *Cooper*). The presence plus suspicious circumstances standard is therefore more like the "mere modicum" standard held unconstitutional in *Jackson* v. *Virginia*, 443 U.S. 307 (1979), than like the "substantial evidence" requirement set out in *Glasser*.

II. THE GOVERNMENT'S AVOIDS PETITIONER'S *Franks* v. *Delaware* ARGUMENT by ASSUMING THAT THE TERM "RECKLESS DISREGARD FOR TRUTH" HAS THE SAME MEANING IN FIRST AND FOURTH AMENDMENT CONTEXTS.

The government makes the unequivocal assertion that this Court "has already determined that a standard of 'reckless disregard for the truth' is to apply in both contexts" (Br. Opp. 13), and follows this assertion with quotations from *Franks* v. *Delaware*, 438 U.S. 154 (1978), and *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), which both use the phrase "reckless disregard for the truth." But this similarity of phraseology is the beginning of Petitioner's inquiry, not the end. The question is not whether the same words are used in both cases, but whether they were intended to carry the same meaning, regardless of context. The government apparently assumes that identity of terminology requires identity of meaning; even a moment's reflection is enough to destroy this contention.

Terms and phrases such as "good faith reliance," "assault," "fraud," or "due process of law" carry widely differing connotations depending on whether the context is civil or criminal, tort or securities, an administrative hearing, civil trial, or criminal trial for a capital offense. The "due process of law" to which a welfare mother is entitled before her benefits are terminated is quite different from the "due process of law" which a person accused of murder must receive before he is convicted and executed. It is entirely appropriate to construe "recklessness" in a First Amendment context so as to require *subjective* bad faith (whether the speaker "*in fact* entertained

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[1] *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968). An important purpose behind this standard in the context of the First Amendment is the recognition that unless "honest mistakes" are protected, the media will be chilled away from vigorous reporting.

serious doubts" about the statement[3]) while defining "recklessness" in the Fourth Amendment context in terms of *objective* bad faith ("whether a reasonably well-trained officer would have known" that the statement was false[4]).

Legal doctrines governing First and Fourth Amendment "good faith" inquiries have always maintained the subjective-objective distinction Petitioner seeks. In libel cases the finder of fact must determine "whether the publication was indeed made in good faith," *St. Amant*, *supra* at 732, an inquiry which "calls a defendant's state of mind into question," *Hutchinson* v. *Proxmire*, 443 U.S. 111, 120 n.9 (1978) and in which a defendant's "subjective awareness of probable falsity," *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 335 n.6 (1974) is critical. In Fourth Amendment cases, however, "good faith on the part of the arresting officer is not enough. . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate. *Terry* v. *Ohio*, 329 U.S. 1, 22 (1967). The stress on objectivity in evaluating a policeman's right to stop-and-frisk was recently reemphasized in a different context in *United States* v. *Leon*, *supra*, in which the Court expressly stated that the "objective good faith inquiry" should "eschew inquiries into the subjective beliefs of law enforcement officers. . . ." 104 S.Ct. at 3421 n.23. It is precisely this distinction which, as Petitioner argued in his brief, should govern the interpretation of "recklessness" in the First and Fourth Amendment contexts.

The government's final contention, that Petitioner was "unable to offer an alternative" to the *St. Amant* test (Br. Opp. 14), is unfounded. Petitioner's brief detailed at length (*see*, *e.g.*, pp. 21-23) the appropriate test: one which measures recklessness in terms of objectively ascertainable facts and circumstances of the case rather than one which focuses on the officers' subjective belief, however unreasonable.

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[4] *United States* v. *Leon*, 104 S.Ct. 3405, 3421 n.23 (1984).

Conclusion.

For the above-stated reasons, as well as those set out in Petitioner's petition for a writ of certiorari, this Court should grant the Writ to decide the important questions of law raised here.

Respectfully submitted,

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